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6                   **UNITED STATES DISTRICT COURT**  
7                   **DISTRICT OF NEVADA**  
8

9 PABLO CEBALLOS,

10                  Petitioner,

2:07-cv-01023-GMN-PAL

11 vs.

ORDER

13 BRIAN WILLIAMS, *et al.*,

14                  Respondents.

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16                  This habeas matter under 28 U.S.C. § 2254 comes before the Court on its *sua sponte*  
17 inquiry into whether the petition is subject to dismissal because Ground 4 is not exhausted,  
18 following upon the petitioner's response (#30) to the Court's show cause order (#24).

19                    ***Background***

20                  Petitioner Pablo Ceballos challenges his 2003 Nevada state conviction, pursuant to  
21 a jury verdict, of one count of burglary and one count of uttering a forged instrument as well  
22 as his adjudication by the state district court as a habitual criminal. Prior to filing the present  
23 federal habeas petition, petitioner challenged the conviction and/or habitual criminal  
24 adjudication on direct appeal and in a state post-conviction petition that was pursued through  
25 a state post-conviction appeal.

26                  In the federal petition, petitioner presented five grounds. Grounds 1 through 4 in the  
27 federal petition were not exhausted in the first state post-conviction proceedings. It appears  
28 that corresponding claims were raised initially in the state post-conviction petition in the state

1 district court. However, it is undisputed that the claims were not presented to the Supreme  
 2 Court of Nevada on the appeal from the denial of the first state post-conviction petition. This  
 3 Court granted petitioner's motion for a stay of the federal proceedings to return to state court  
 4 to seek to exhaust the claims.<sup>1</sup>

5 Petitioner thereafter filed a second state post-conviction petition. The state district  
 6 court denied the petition, and the state supreme court affirmed on appeal.

7 The claims in federal Ground 4 were not presented to the state courts in the second  
 8 state petition.

9 In federal Ground 4, petitioner alleges that he was subjected to cruel and unusual  
 10 punishment in violation of the Eighth Amendment because the habitual criminal adjudication  
 11 was not submitted to the jury.

12 In contrast, in state Ground 4 in the second state petition, petitioner alleged that he  
 13 was subjected to cruel and unusual punishment in violation of the Eighth Amendment without  
 14 making any allegation that the failure to submit the habitual criminal adjudication to a jury  
 15 gave rise to the alleged violation.<sup>2</sup>

#### 16                           ***Governing Exhaustion Law***

17 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state court  
 18 remedies on a claim before presenting that claim to the federal courts. To satisfy this  
 19 exhaustion requirement, the claim must have been fairly presented to the state courts  
 20 completely through to the highest court available, in this case the Supreme Court of Nevada.  
 21 *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9<sup>th</sup> Cir. 2003)(*en banc*); *Vang v. Nevada*, 329  
 22 F.3d 1069, 1075 (9<sup>th</sup> Cir. 2003). In the state courts, the petitioner must refer to the specific  
 23 federal constitutional guarantee and must also state the facts that entitle the petitioner to relief  
 24 on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9<sup>th</sup> Cir.  
 25 2000). That is, fair presentation requires that the petitioner present the state courts with both

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 27                           <sup>1</sup>See #16, at 3-4; ## 17-19.

28                           <sup>2</sup>See Supplemental Memorandum, at 8 (#22, at electronic docketing pages 22 & 32).

1 the operative facts and the federal legal theory upon which his claim is based. *E.g., Castillo*  
 2 *v. McFadden*, 399 F.3d 993, 999 (9<sup>th</sup> Cir. 2005). The exhaustion requirement insures that the  
 3 state courts, as a matter of federal-state comity, will have the first opportunity to pass upon  
 4 and correct alleged violations of federal constitutional guarantees. See, e.g., *Coleman v.*  
 5 *Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

6 Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a mixed  
 7 petition presenting both exhausted and unexhausted claims must be dismissed without  
 8 prejudice unless the petitioner dismisses the unexhausted claims or seeks other appropriate  
 9 relief.

10 ***Discussion***

11 Petitioner asserts in the show-cause response, without any citation to the state court  
 12 record, that he presented both the operative facts and the federal legal theory upon which  
 13 federal Ground 4 is based in his second state petition during the stay. Petitioner's assertion  
 14 is belied rather than supported by the state court record. In state Ground 4 in the second  
 15 state petition, petitioner alleged that he was subjected to cruel and unusual punishment in  
 16 violation of the Eighth Amendment without making any allegation that the failure to submit the  
 17 habitual criminal adjudication to a jury gave rise to the alleged Eighth Amendment violation.  
 18 He instead challenged the factual underpinnings of the habitual criminal adjudication and the  
 19 proportionality of the sentence to the crime, without referring to a failure to submit the issue  
 20 to a jury.<sup>3</sup> Ground 4 therefore is not exhausted.<sup>4</sup>

21 IT THEREFORE IS ORDERED, considering the foregoing, that the Court holds that  
 22 Ground 4 is not exhausted.

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 24 <sup>3</sup>See Supplemental Memorandum, at 8 (#22, at electronic docketing pages 22 & 32).

25 <sup>4</sup>Federal Ground 4 in any event is without merit. Any claim under *Apprendi v. New Jersey*, 530 U.S.  
 26 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), based upon the Nevada habitual criminal adjudication not  
 27 being submitted to a jury is without merit. See *Tilcock v. Budge*, 538 F.3d 1138, 1143-45 (9<sup>th</sup> Cir. 2008), cert.  
 28 denied, \_\_\_\_ U.S. \_\_\_, 129 S.Ct. 926, 173 L.Ed.2d 132 (2009). Such a claim of *Apprendi* error further does  
 not arise under the Eighth Amendment, which provides no greater protection in this context than do the Sixth  
 and Fourteenth Amendments, which provide the constitutional underpinnings for the *Apprendi* decision. See  
 530 U.S. at 476-777, 120 S.Ct. at 2355-56.

1 IT FURTHER IS ORDERED that petitioner shall have thirty (30) days from entry of this  
2 order within which to mail to the Clerk of Court for filing either a motion for dismissal without  
3 prejudice of the entire petition, for partial dismissal only of Ground 4, and/or for other  
4 appropriate relief.

5 The entire petition will be dismissed without further advance notice for lack of complete  
6 exhaustion if an appropriate motion is not timely mailed to the Clerk for filing.

7 DATED: June 30, 2010.

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11 GLORIA M. NAVARRO  
12 United States District Judge  
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